No. 96-542

IN THE

Supreme Court of the United States

October Term, 1996

WALTER McMILLIAN,

Petitioner,

v.

MONROE COUNTY, ALABAMA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY MEMORANDUM

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The same arguments made by the respondent in opposition to the petition here were also made by the respondent in *Swint v. Chambers County Commission*, 115 S.Ct. 1203 (1995), in its unsuccessful effort to persuade this Court to deny certiorari in that case. Indeed, many of the passages of the opposition briefs are almost identical. *Compare* Respondent's Brief in Opposition to Petition for a Writ of Certiorari in the present case ("Op. Cert."), pp. 3-7, 16-18 with Respondent's Brief in Opposition to Petition for a Writ of Certiorari in *Swint v. Chambers County Commission*, No. 93-1636, pp. 3-7, 10-13. Nothing stated by the respondent here demonstrates that the issue is any less important at the present time, or that the conflict in the circuits is any less pronounced, than when this Court granted certiorari in *Swint*.

If anything, the petitioner's argument for certiorari and eventual reversal is even more compelling here than in *Swint*. In *Swint*, there was nothing in the record to indicate whether any judgment against the sheriff would be paid by the state or the county. *See,* Tr. Oral Arg., *Swint v. Chambers County Commission*, No. 93-1696, p. 59 (Jan. 10, 1995). By contrast, in the present case, the record demonstrates that a judgment likely would be paid by the county's self-insurance fund and not by the state. Pet. App. 77a. This suggests that, contrary to the respondent's argument, the sheriff is not the alter ego of the state for Eleventh Amendment purposes. *See, Hess v. Port Authority*, 115 S.Ct. 394, 404 (1994). This bolsters the petitioner's contention that the sheriff is a final policymaker for the county in the area of law enforcement and not a policymaker for the state. Unfortunately, the District Court released the county by granting a motion to dismiss, and therefore did not consider any evidence regarding who would pay the judgment, pet. app. 58a, thus compounding the error in this case.

In connection with this Eleventh Amendment matter, the respondent here cites a number of Eleventh Circuit decisions holding that Alabama sheriffs are entitled to Eleventh Amendment immunity. Op. Cert. at 25. The respondent then states that, in addition to dismissing the county, the District Court in the present case also dismissed the sheriff in his official capacity "based on his entitlement to Eleventh Amendment immunity as an officer of the state of Alabama." *Id.* at 25. The respondent adds: "McMillian does not challenge the ruling that Alabama sheriffs are state officers for the purpose of the Eleventh Amendment but contends that sheriffs are policymakers for the county nevertheless." *Id.* at 26.

The respondent is not correct in terms of what happened in this case or in terms of petitioner McMillian's position.

The District Court specifically noted that the petitioner, as plaintiff, was *not* making an official capacity claim against the sheriff as a representative of the state, but only as a policymaker for the county. Pet. App. 35a-36a and n.2. Thus, the official capacity claim was never decided on Eleventh Amendment grounds, but only as part of the county liability analysis. *Id.* at 35a-36a, 51a-58a.

To the extent it is relevant, the Eleventh Circuit has held in other cases that a sheriff is entitled to Eleventh Amendment immunity in his official capacity, and the petitioner here believes those holdings are entirely wrong. The Eleventh Circuit's rulings to that effect were based on the assumption that suits against sheriffs are a recharacterization of a claim against the State of Alabama. However, that court has also stated that this assumption does not control where the county -- as in the present case -- has been sued directly:

> Because suits against an official in his or her official capacity are suits against the entity the individual represents, we assume that this suit against [Sheriff] Amerson in his official capacity is simply a recharacterization of a claim against the State of Alabama. *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). As such, the Eleventh Amendment bars the award of damages for past injuries because such damages would be paid out of state funds. *See generally, Alabama v. Pugh*, 438 U.S. 781 (1978). To the extent this claim may be against [Sheriff] Amerson as representative of the county, [the plaintiff] Parker will suffer no prejudice from a finding that the Eleventh Amendment bars the claim. Parker can and did sue the county directly.

Parker v. Williams, 862 F.2d 1471 (11th Cir. 1989).

The Eleventh Circuit's suggestion in *Parker* and later cases that judgments against Alabama sheriffs are paid by the state is not based on any statute or declaration of state law, nor on any proof adduced in any of the cases. *See, Carr v. City of Florence*, 916 F.2d 1521, 1527-1528 (11th Cir. 1990) (Clark, J., concurring) ("*Parker* conducted no analysis of whether the state of Alabama would be liable for judgments entered against county sheriffs but simply assumed that the state would have to pay the claims. . . . The proceedings below in this case did not establish who would pay a judgment, the state or the county."). In the present case, the fact that the county rather than the state is likely to pay any judgment against the sheriff not only demonstrates the Eleventh Circuit has been wrong in its Eleventh Amendment analysis, but also bolsters the petitioner's contention here that the sheriff is a final county policymaker in the area of law enforcement and is not, contrary to the respondent's claim, the alter ego of the state.

As did the respondent in *Swint* when it opposed certiorari, the respondent here insists that this case is about nothing more than the proper construction of Alabama law. However, the dispute in *Swint*, replicated in the present case, is not over the Eleventh Circuit's construction of state law, but over whether that construction automatically removes counties from any liability for the actions of sheriffs under 42 U.S.C. § 1983. The Eleventh Circuit held that it does. As noted in the petition, pp. 6-17, this Court and several courts of appeals have reached contrary conclusions although the relevant principles of state law were the same in those cases as in Alabama. While the respondent tries to suggest that there is no conflict between the Eleventh Circuit and those other courts of appeals, op. cert. at 16-18, the Eleventh Circuit itself recognized that it is in conflict with the analysis employed by at least one other court of appeals -- the Fifth

Circuit. Pet. App. 16a and n.6.[1]

At pp. 8-12 of its brief here, the respondent points to three features of Alabama law that were the purported basis for the Eleventh Circuit's decision. These are the label of the sheriff as a state official under state law, op. cert. at 11, the absence of county respondeat superior liability for the actions of sheriffs under state tort law, *id.* at 8-9, and the fact that "under Alabama's governmental structure, county governments can only exercise the authority explicitly granted them by the state legislature," with "Alabama grant[ing] law enforcement authority to sheriffs and not counties." *Id.* at 9.

None of these features distinguish Alabama in a relevant way from the states involved in the decisions that are in conflict with that of the Eleventh Circuit. As for the purported state law characterization of Alabama sheriffs as state officials, the Eleventh Circuit specifically held that this point was not dispositive. Pet. App. 7a. If it were, the Eleventh Circuit would be in conflict with the Fifth Circuit's decision in *Crane v. Texas*, 766 F.2d 193, 195 (5th Cir.), *cert.*

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[1] As noted at p. 17 of the respondent's brief, the Seventh Circuit appears to take the same position as the Eleventh on this issue. *See, Soderbeck v. Burnett County*, 821 F.2d 446, 451 (7th Cir. 1987). However, the respondent is incorrect to suggest that the Tenth Circuit also takes the same position. In the case cited by the respondent, *Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988), the Tenth Circuit dealt only with whether the County Commissioners had direct supervisory duties with respect to deputy sheriffs, but did not address whether the county was liable for the actions of the sheriff as a final county policymaker. Finally, the respondent is incorrect at p. 18 in its characterization of the Eleventh Circuit's decision involving Florida sheriffs, *Lucas v. O'Loughlin*, 831 F.2d 232, 234-235 (11th Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988). The Eleventh Circuit did not hold that sheriffs are final policymakers in Florida with respect to law enforcement, but held only that they are final policymakers with respect to hiring and firing deputies.

denied, 474 U.S. 1020 (1985), and the Fourth Circuit's decision in *Dotson v. Chester*, 937 F.2d 920, 924, 926, 932 (4th Cir. 1991), as mentioned at pp. 13-15 of the petition for certiorari.[2] As for respondeat superior liability under state law, a state can structure its own tort law principles and immunities as it chooses, but that does not insulate local governments from liability under § 1983. The Eleventh Circuit suggests that such structuring makes a difference under § 1983, while the Fourth and Sixth Circuits have held that sheriffs are final county policymakers irrespective of the fact that counties are not liable for the actions of sheriffs under state law in the states at issue. Pet. Cert. at 15-16, *citing, Dotson v. Chester* and *Marchese v. Lucas*, 758 F.2d 181, 188-189 (6th Cir. 1985). As for the Eleventh Circuit's statement that "Alabama counties have only the authority granted them by the legislature," pet. app. 7a-8a, this is no different from the principle in most states. Counties are creatures of the states and are limited to those powers permitted by state law. *See*, Sands & Libonati, *Local Government Law*, §§ 3.01, 8.01. While the Eleventh Circuit claims that Alabama law makes no specific assignment of law enforcement power to counties independent of the sheriff's power, pet. app. 8a, that also is consistent with the practice in other states.

For it is not as if Ohio, Texas, Arkansas, Massachusetts, Maryland, and Michigan (which are among the states involved in the conflicting cases discussed in the petition) have created situations where county commissioners ride with the sheriff in the patrol car or supervise the sheriff's law

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[2] Moreover, Alabama state law often refers to sheriffs as county officials. *See*, Pet. Cert. 8. *See also*, Ala Code § 36-22-16(a) ("Sheriffs of the several counties . . . shall be compensated . . . by an annual salary payable in equal installments out of the county treasury as the salaries of *other county* employees are paid").

enforcement duties. As in Alabama, the sheriff is the chief law enforcement officer in each county in those states, and there is no assignment of law enforcement power to the counties or other county officials independent of that assigned to the sheriff (except to the extent that the county governing boards control the funding of the sheriff's office, which is true in Alabama and most states). Thus, counties in those other states have no more law enforcement power than do counties in Alabama.[3]

The respondent cites the involvement of state officials in impeachment proceedings against sheriffs. Op. Cert. at 16. Of course, impeachment is a very rare event. *See, Parker v. Amerson*, 519 So.2d 442, 444 n.1 (Ala. 1987) (citing only three cases in the past 100 years dealing with impeachment of sheriffs). Much more relevant is the identity of those persons who have the power to choose the sheriff at each regular election, and to turn out an incumbent candidate if he or she is not performing satisfactorily and lawfully -- the voters of each county. The role of the voters of the county is vastly more important in controlling the activities of the sheriff and in determining who serves and does not serve than the role of state officials on those extremely infrequent occasions when impeachment is attempted. *See, City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981)

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[3] The respondent cites the Eleventh Circuit's analogy to a hypothetical situation where a city's precinct police commanders had final authority within their precincts to process arrestees, but their policies remained city policies rather than precinct policies. Op. Cert. at 10, *citing* Pet. App. 10a. Whatever the accuracy of that analysis on its own, it is not a proper analogy to the present case. It would be akin to the present case only if precincts were separate units of local government, if the precinct commander was appointed not by a city police chief but elected by the voters of the precinct, and if the precinct had its own police department funded by a precinct treasury on a budget set by the precinct governing board.

(compensatory damages awarded against a local government under § 1983 "may themselves induce the public to vote the wrongdoers out of office"). This demonstrates that the sheriff sets policy for the county and its citizens rather than for state officials.

The respondent seems to contend that unless the county commissioners themselves supervise and control the sheriff, the sheriff cannot be a county policymaker. Op. Cert. at 15 ("Alabama law gives county commissions no role in the development of policies governing local law enforcement or in the supervision of sheriffs in the performance of their law enforcement duties"); *id.* at 23 ("The Monroe County Commission has no power to enact policies affecting law enforcement or to review those adopted by the sheriff"). This is related to the respondent's assertion that *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), adopted some sort of view of local government as being identical to corporate business governance. Op. Cert. at 19-21. According to the respondent:

> [A]ccepting the petitioner's position . . . would require the Court to abandon [the] concept of municipalities as corporations. A "corporation" has a single governing board that controls its operations and either sets its "policies" or delegates that function to the officers. It is difficult to imagine how a single corporation could include both a governing board and a separate official vested with unchecked authority to set corporate policy.

Id. at 20.

All of this implies that, for purposes of § 1983, only legislative bodies can make final policy for local governments and only county commissions can make final policy for counties. It ignores the fact that most governments operate

differently than the typical business corporation. Most governments have a separation of powers between executive officials and legislative bodies, with executive officials setting policy in some areas and legislative officials in others.

Thus, in analyzing § 1983, this Court specifically has recognized that government officials other than those in legislative bodies can be final local governmental policymakers.

> [I]t is when execution of a government's policy or custom, *whether* made by its lawmakers *or* by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell v. New York City Dept. of Social Services, 436 U.S. at 694 (emphasis added).

> [In § 1983 cases], the trial judge must identify those officials *or* governmental bodies who speak with final policymaking authority for the local government[]. . . .

Jett v. Dallas Independent School Dist., 491 U.S. 701, 737 (1989). By noting in *Monell* that local officials other than "lawmakers" can make policy, and in *Jett* that officials other than "governmental bodies" can make policy, this Court clearly has rejected the notion that policy can be made only by legislative bodies.

The respondent's misunderstanding in this regard is akin to that of the Eleventh Circuit, which has said that a delegation of law enforcement power to the sheriff is, by definition, not a delegation to the county. ("Alabama law assigns law enforcement authority to sheriffs but not to counties." Pet. App. 8a.) The Eleventh Circuit and the

respondent presuppose that unless some county-based official other than the sheriff has law enforcement power, the county has none. But that is simply wrong. As the Fifth Circuit said in *Turner v. Upton County,* 915 F.2d 133, 137 (5th Cir. 1990):

> The sheriff is an elected county official equal in authority to the county commissioners within that jurisdiction; his actions are as much the actions of the county as the actions of those commissioners.

For the foregoing reasons, as well as those stated in the petition, a writ of certiorari should issue to review the decision of the Eleventh Circuit in this case.

Respectfully Submitted,

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